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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-204

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
Petitioner,

v.

JOSEPH M. NOLAN, IMPERIAL "400" NATIONAL, INC., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
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v.

JOSEPH M. NOLAN, IMPERIAL "400" NATIONAL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Judicial Council of the Third Circuit petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The opinions of the court of appeals (App. A-C, *infra*, pp. A1-A38) are not yet reported. The district court rendered no opinion.

JURISDICTION.

The judgment of the court of appeals was entered on April 23, 1973, and a timely petition for rehearing filed by the Judicial Council of the Third Circuit was denied on May 23, 1973. On June 13, 1973 the court of appeals *en banc* denied the Council's petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See *Auto Workers v. Scofield*, 382 U. S. 205, 214.

QUESTIONS PRESENTED.

1. Whether, in invalidating a judicial council's resolution of general applicability designed to avoid the appearance of conflicts of interest in bankruptcy proceedings, the court of appeals improperly substituted its judgment for that of the council with respect to the wisdom of and the need for the resolution.

2. Whether the council's adoption of the resolution without a hearing denied due process of law to the attorney whose conduct led the council to adopt the resolution, where the application of the resolution to the reorganization in which the attorney was participating, terminated his appointment as attorney for the trustee.

STATUTE INVOLVED.

28 U. S. C. 332 provides in pertinent part:

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

* * * *

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the Judicial Council.

* * * *

STATEMENT.

In February, 1966, Joseph M. Nolan was appointed attorney for the trustee in a Chapter X reorganization proceeding for Imperial "400" National, Inc. ("Imperial") in the United States District Court for the District of New Jersey. After the Schiavone Construction Company ("Schiavone"), a major client of Nolan's law firm, expressed an interest in proposing a reorganization plan, the district court in 1971 ordered Nolan not to participate in proceedings involving any plans of reorganization. The court permitted Nolan, however, to continue to represent the trustee (himself an attorney) in all other phases of the proceeding. Schiavone filed a plan in June 1971 (R. 567-571).[1]

Three appeals involving the Imperial reorganization were heard by the Court of Appeals for the Third Circuit.[2] Following the last such appeal, two members of the panel (Judges Van Dusen and Adams)[3] by letter informed Chief Judge Seitz of that court that they were concerned about an "appearance of impropriety to laymen" resulting from the continued representation of the trustee by an attorney at the same time that his law firm was representing "one of [its] best clients" as the proponent of a plan (R. 90a-91a). After discussing the Judges' letter at a meeting, the

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1. "R" refers to the Appendix in the court of appeals. A certified copy of that Appendix and the proceedings in the court below is being lodged with the Clerk of this Court.

2. On one appeal, the court of appeals held that the district court had awarded excessive fees to the trustee and his attorney. 432 F. 2d 232. The history of the reorganization proceeding is detailed in an earlier opinion of the court of appeals. 429 F. 2d 671. The third opinion of the court of appeals is reported at 456 F. 2d 926.

3. The third member of the panel was a Senior circuit judge.

Judicial Council of the Third Circuit adopted the following resolution on February 10, 1972[4] (R. 87a-88a):

> * * * that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that the refusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest.

Since the resolution was "intended to apply to the entire Circuit", it was distributed to the chief judges of the United States district courts in the Third Circuit (R. 27, 578).

The Judicial Council also requested Chief Judge Seitz to bring the resolution to the attention of the district judge supervising the Imperial reorganization. In a letter to that judge (Judge Shaw), Chief Judge Seitz stated that the "factual bases" for the Council's resolution were that (R. 19a-20a):

> The Council was advised that the law firm of the attorney for the trustee represents a client which is seeking to secure control of the assets under one of the proposed plans. The Council was further advised that in view of these circumstances the attorney for the trustee has taken the position that he will not act as attorney for the trustee in connection with any responsibilities the trustee may have with respect to the approval of a plan but that he will continue to represent the trustee

4. The resolution was unanimously adopted by Chief Judge Seitz, and Judges Van Dusen, Aldisert, Adams, Max Rosenn and the late James Rosen. Judges Hunter and Gibbons have disqualified themselves throughout these proceedings for a reason other than their membership on the Council.

in other matters of the trusteeship; further that this approach has your actual or tacit approval.

Chief Judge Seitz emphasized that "the Council did not find that there was a conflict of interest in fact but only that the 'appearance' was such that the relationship should not be permitted to continue" (R. 20a). He further stated his hope that application of the resolution would "not interfere with the progress of the reorganization" since "the attorney for the trustee is not involved in the approval of a plan and the trustee is himself an attorney" (R. 21a).

In replying, Judge Shaw stated that he believed that Nolan should be given a hearing "before disciplinary action is taken against him as an officer of the court" (R. 26a).[5] Chief Judge Seitz responded (R. 28a):

> The Council desires to emphasize that its resolution is directed at the *appearance* of a conflict of interest. Consequently, it does not view Mr. Nolan's case as presenting any issue of removal "for cause" in the sense of any alleged personal wrongdoing. Thus, we do not consider that the implementation of the resolution involves disciplinary action which would call for a hearing at which Mr. Nolan would be expected to defend himself. We are talking policy [emphasis in original].

The Judicial Council discussed the correspondence between Chief Judge Seitz and Judge Shaw at a Council meeting on April 12, 1972. The Council unanimously reaffirmed its prior resolution, and requested the district court to "give the resolution appropriate consideration" (R. 92a).

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5. Judge Shaw noted that Nolan's continued retainer had been approved by himself, the Securities and Exchange Commission, and counsel for the Union Bank of Los Angeles, "the sole and leading critic of the conduct of the Trustee and Counsel for the Trustee" (R. 22a-23a).

Pursuant to the resolution, on May 2, 1972, Judge Shaw terminated Nolan's appointment as attorney for the trustee (R. 3a-5a). On the same day, Nolan appealed the termination order to the court of appeals. After the judges of the Third Circuit recused themselves, the Chief Justice, pursuant to 28 U. S. C. 294(d), designated three Senior circuit judges from other circuits (Judge Aldrich of the First Circuit, and Judges Lumbard and Smith of the Second Circuit) to hear Nolan's appeal.[6]

On April 23, 1973, a divided court reversed Judge Shaw's termination order (App. A, *infra*, pp. A1-A33). Writing for the majority, Judge Aldrich held that the court of appeals had jurisdiction of the appeal and could review the validity of the Council's resolution upon which it was based (App. A, *infra*, pp. A2-A3).[7] The court held that the Council's resolution was invalid and remanded the case to the district court for a hearing to determine whether Nolan

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6. On May 2, 1972, Nolan also filed a complaint against the Council in the United States District Court for the District of New Jersey, alleging that the Council's resolution was unlawful and seeking reinstatement as attorney for the trustee. Judge Roszel M. Thomsen of the District of Maryland, who was designated by the Chief Justice to hear the matter, dismissed the action for lack of jurisdiction on the ground that Nolan had an adequate remedy by appeal of the termination order to the court of appeals (346 F. Supp. 500). Nolan appealed that dismissal order to the Third Circuit, which heard and decided that appeal together with the appeal from the termination order.

Nolan also appealed to the court of appeals from the district court's order vacating its stay of the termination order. On June 20, 1972, a panel of the Third Circuit consisting of Senior Judges Biggs, Maris and Hastie affirmed this order (R. 41a-47a).

Nolan also filed in this Court a motion for a stay and a petition for a writ of mandamus or prohibition. This Court denied all relief (406 U. S. 956; 409 U. S. 822).

7. The court also held that Judge Thomsen properly dismissed Nolan's suit against the Council, on the ground that Nolan has an adequate remedy by appeal (App. A, *infra*, pp. A2, A17; *supra*, fn. 6).

should be re-engaged as attorney for the trustee (App. A, *infra*, p. A17).

Judge Lumbard, dissenting, concluded that "No district judge or panel of the Court of Appeals for the Third Circuit, no matter how constituted, has the power to question the action of the Circuit Council of the Third Circuit" and that only this Court had jurisdiction to review the action of the Council (App. A, *infra*, p. A19). He also "suggest[ed] that the active circuit judges should not have recused themselves from hearing these appeals; instead, they should have sat as the Court of Appeals en banc" (App. A, *infra*, p. A18, n. 1). On the merits, Judge Lumbard concluded that the Council's resolution was valid and properly applied to Nolan (App. A, *infra*, pp. A20-A33).

After that decision, the Judicial Council was permitted to intervene.[8] The Council filed a timely petition for rehearing, which the court, Judge Lumbard dissenting, denied (App. B, *infra*, pp. A34-A36).

Under Third Circuit practice, every petition for rehearing is considered by the active judges of the court of appeals *en banc*. On June 13, 1973, the active judges of the court of appeals, *en banc*,[9] concluded that the Council's petition warranted rehearing *en banc* since it raised issues of "exceptional importance," but denied the petition solely because, having previously recused themselves, they did not want it to appear that they had changed their position as a result of the opinion of the panel majority

8. The Council had fully participated in the appeals (*supra*, fn. 6). Since the Council, however, had not been a party to the reorganization proceeding, it moved to intervene in the court of appeals in order to remove any question concerning its right to seek review of the court of appeals' decision.

9. Judge Weis, who was not a member of the court of appeals when it adopted the resolution, participated in this decision.

(App. C, *infra*, pp. A37-A38).[10] The court also stated that it was "hopeful that the Supreme Court will see fit to review this important matter * * *" (*ibid.*).

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10. The designated panel and the court of appeals *en banc* also denied a petition for rehearing *en banc* filed by the Union Bank of Los Angeles, a major creditor of the debtor which had actively participated in the proceeding (App. B, C, *infra*, pp. A36, A38).

The panel that had decided the case stayed the issuance of the mandate pending disposition of the Council's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT.

This case presents critical questions concerning the authority of a circuit judicial council, acting pursuant to its power under 28 U. S. C. 332 to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," to adopt general regulations designed to insure high ethical standards in the district courts in the circuit, and the procedure the council must follow in promulgating such regulations. It also presents the important related issue of the scope of judicial review of those regulations. These issues were touched upon, but not decided in *Chandler v. Judicial Council*, 398 U. S. 74, the only prior decision dealing with the judicial councils since Congress created them in 1939 (53 Stat. 1223).

Congress intended the judicial councils to play a critical role in insuring the proper functioning of the district courts. A major facet of this role, as the Judicial Conference of the United States explained in its 1961 annual report, is "the preventing of any stigma, disrepute, or other element of loss of public confidence arising in the Federal courts or the administration of justice by them from any nature of action by an individual judge or a person attached to the courts" (H. Doc. No. 201, 87th Cong., 1st Sess., pp. 6-7). As Chief Judge Groner, one of the principal sponsors of the judicial councils, told the Congress in 1939, the council should have the power to "take whatever steps are thought to be necessary or declared to be necessary to correct those things which ought not to exist in a well run judicial system" (S. Rep. No. 426, 76th Cong., 1st Sess., p. 3; Hearings before a Subcommittee of the Senate Judiciary Committee on S. 188, 76th Cong., 1st Sess., p. 11).

In the Council's view, the decision of the court of appeals would seriously weaken its ability to regulate effectively and expeditiously the conduct of judicial proceedings in the district courts in its circuit. The result in this case is particularly serious because the Council was dealing with a subject that goes to the essence of maintaining public confidence in the courts—the avoidance of any appearance of conflicts of interest. The resolution was directed to a group from whom the public has a right to expect observance of the highest ethical standards—lawyers who, as officers of the court, participate in bankruptcy reorganizations. In those proceedings, which involve large amounts and which unfortunately have a history of unsavory practices, it is particularly important that the highest ethical precepts be followed. It is therefore essential to the proper administration of justice in the federal courts for this Court to review the decision of the court of appeals and to correct what the Council believes to be two serious errors of that court.

1. The court of appeals recognized that the Council has authority to deal with "the important matter of conflict of interests" (App. A, *infra*, p. A11). It further ruled that neither the "fact that the resolution worked individual hardship to applicant" nor that "the resolution was occasioned by a particular situation" was determinative of its validity, since "[r]ules, and the maintaining of public relations * * * may often work individual hardship" and "[g]eneral rules must often be made in response to some event that calls attention to their need." (*id.* pp. A11-A12).

The court held, however, that "[t]here was no need for a rule," since "Nolan * * * was the problem," the "Council was not alerted to any general need" and "summary action by the Council was manifestly unnecessary"

(*id.* pp A12, A14). The Court stated that "the resolution was not only triggered by but tailored to a case quite apparently unique" (*id.* p. A12). The court further stated that it gave "especial weight to the [Securities and Exchange Commission], an impartal body experienced in these matters," which, "after a 'balancing of several considerations'" had taken the "pragmatic stance" that Nolan should be permitted to continue as counsel for the trustee on the ground that "the conflict of interest problem was outweighed by the potential delay in the proceedings caused by removal of an officer who, over a period of five years, had accumulated substantial familiarity with the estate," (*id.* pp. A15, A16).

As the foregoing summary of the court of appeals' reasoning indicates, the court substituted its judgment for that of Council with respect to whether there was a general need, whether action by the Council was necessary, and what was the appropriate method for dealing with the problem of appearance of conflict of interest in a corporate reorganization resulting from Nolan's continued participation as counsel for the trustee. Congress committed to the Council, and not to the court, the authority to determine what action is "necessary * * * for the effective and expeditious administration of the business of the courts within its circuit" (28 U. S. C. 332) and "improving the administration of justice within the circuit" (28 U. S. C. 333). "[T]he power entrusted to the Councils by § 332 * * * necessarily involves a large amount of discretion; accordingly review of the Council's actions will usually be narrow in scope" (Mr. Justice Harlan, concurring in *Chandler, supra*, 398 U. S. at 108).

The court of appeals should not itself have undertaken to decide that "[t]hat there was no need for a rule" and that "summary action by the Council was manifestly un-

necessary." The determination whether a rule was necessary and whether summary action was appropriate were matters for the Council to decide. The court of appeals should have reviewed the Council's action merely to determine whether, considering all the circumstances, the Council had acted beyond its broad discretion to take all appropriate and necessary steps for the effective and expeditious administration of judicial business and improving the administration of justice in the circuit. The proper standard of judicial review of the Council's action is thus similar to that customarily applied in reviewing administrative agencies where the settled principle is that "where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress has delegated appropriate authority", *Mourning v. Family Publication Service*, No. 71-829, decided April 24, 1973, slip op. p. 15.

We submit that, under this standard of review, the court of appeals should have upheld the Council's action. The Council dealt with a narrow but important issue of judicial administration. The overriding consideration that motivated the Council was the need to maintain public confidence in the bankruptcy courts in the Third Circuit through the avoidance of any appearance of a conflict of interest by attorneys for trustees who, as appointees, of the court, participated in bankruptcy proceedings. The Council determined that a general resolution specifying standards of conduct for such situations was the best means to guide the district courts in the Third Circuit. This was a reasonable conclusion, and one to which the court of appeals should have deferred as an appropriate exercise of the Council's authority under 28 U. S. C. 332.

2. The court of appeals further erred in ruling that the Council's adoption of the resolution without a hearing denied Nolan due process.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U. S. 471, 481. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action," *Cafeteria Workers v. McElroy*, 367 U. S. 886, 894-985.

In the present case, the Council adopted a general resolution applicable to all bankruptcy proceedings in the Third Circuit announcing standards for lawyers participating in such proceedings as court appointees which were intended to eliminate the appearance of a conflict of interest by such lawyer-appointees. The basic underlying facts with respect to Nolan's continued participation in the reorganization after his law firm had submitted a plan on behalf of a principal client of the firm were undisputed. The Council had no factual issues to resolve before it could decide whether to adopt its resolution. The decision whether the continued participation of a lawyer as attorney for the trustee in a reorganization in such circumstances created an appearance of a conflict of interest required the Council to make delicate policy judgments on the basis of its knowledge of and experience with bankruptcy proceedings in the circuit, and its evaluation of the probable public reaction to such continued participation. A hearing would neither have aided the Council in its deliberations nor enabled Nolan to bring to the Council's attention any

facts that would have led it to reach a different conclusion concerning the need for the resolution.[11]

The fact that the application of the resolution to the present reorganization would result in terminating Nolan's employment as attorney for the trustee did not require a hearing before the Council acted. As the court of appeals recognized (App. A, *infra*, pp. A11-A12), the resolution was not invalid merely because it "worked individual hardship to [Nolan]," since "rules * * * may often work individual hardship." Assuming that Nolan had some legally protected interest in retaining his position as counsel,[12] it did not entitle him to a hearing before the Council could promulgate a general regulation governing his conduct in that post. At most, it might have entitled him to a hearing before the district court to ascertain whether the regulation covered him—and he made no claim that it did not. Cf. *United States v. Storer Broadcasting Co.*, 351 U. S. 192.

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11. This analysis is directed only to the question whether a prior hearing was required before the promulgation of the resolution. In its petition for rehearing (pp. 13-14), the Council expressly disagreed with Judge Aldrich's view that it is "unrealistic" to think that the Council would have entertained a request for reconsideration if facts warranting reconsideration were stated (App. A, *infra*, p. A14). The Judicial Council of the Third Circuit has granted a hearing in at least one earlier case. *Matter of the Examination of the Records of Rodebaugh*, 10 F. R. D. 207 (1950). A reasonable prerequisite to any judicial review of Council action is that the party challenging Council action, as applied to him, exhaust his administrative remedies by seeking relief from the Council itself. See *Chandler v. Judicial Council*, 398 U. S. at 87-89. As Judge Lumbard noted (App. A, *infra*, pp. A26-A27, A31), this was not done here.

12. Since the district judge appoints the attorney for the trustee (11 U. S. C. 557), presumably the judge may remove the attorney if at any time the judge is dissatisfied with the attorney's performance. In any event, since the attorney is required to be disinterested, the judge may remove him if he ceases to be so. See 11 U. S. C. 558, 560, 562. If during the reorganization a situation develops which presents the appearance of a conflict of interest involving the attorney, the judge certainly may remove him.

This Court recently reiterated the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases in the other," *United States v. Florida East Coast Py. Co.*, No. 70-279, decided January 22, 1973, slip op. pp. 21-22. The action of the Council in here "promulgating policy-type rules or standards" designed to eliminate the appearance of conflict of interest in bankruptcy proceedings did not require a prior hearing.

CONCLUSION.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD G. SEGAL,
SAMUEL D. SLADE,
Attorneys for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1566 and 72-1920 Consolidated

In the Matter of
IMPERIAL "400" NATIONAL, INC., et al.,
Debtors

JOSEPH M. NOLAN
Appellant in No. 72-1566

(D. C. No. B-656-65 In Bankruptcy)
JOSEPH M. NOLAN
Appellant in No. 72-1920

v.

THE JUDICIAL COUNCIL OF THE THIRD CIRCUIT

(D. C. Civil No. 769-72)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 16, 1973

Before LUMBARD*, ALDRICH† and SMITH*,
Senior Circuit Judges

Opinion of the Court

(Filed April 23, 1973)

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* Of the Second Circuit, sitting by designation.
† Of the First Circuit, sitting by designation.

ALDRICH, *Senior Circuit Judge.*

These consolidated appeals from two proceedings in the New Jersey District Court present a single issue, the propriety, viewed in the circumstances under which it was adopted, of a resolution of the Judicial Council of the Third Circuit (Council), dated February 10, 1972, which provides as follows:

> "RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest."

On May 2, 1972 the district court, pursuant to this resolution, removed appellant, Joseph M. Nolan, Esq., as counsel for the trustee in reorganization of Imperial "400" National, Inc. Nolan appealed that order and also brought a petition of mandamus, or declaratory judgment, against the Council. The district court[1] dismissed the mandamus action, July 29, 1972, agreeing with the Council that Nolan had an adequate remedy by way of appeal to this court, and that the district court was without jurisdiction. 346 F. Supp. 500. We, too, agree, and Nolan's appeal from that dismissal must fail. We must, however, address ourselves to our dissenting brother LUMBARD's claim that we lack jurisdiction of the appeal from the original removal order. Since jurisdiction is always open it is, of course, not determinative that in the mandamus proceeding the Council itself took the position that we would have jurisdiction. We

1. Senior Judge Roszel C. Thomsen of the District of Maryland, sitting by designation.

believe, however, that the Council—and the district court—were correct.

On this we see no real issue. We are not reviewing the action of the Court of Appeals, but, directly, of the district court. Admittedly we are reviewing indirectly the action of the Council, but the dissent's assertion that we have no power to do this is just that. The circuit council, while composed of judges, is an administrative body, and not a court. *Chandler v. Judicial Council*, 1970, 398 U.S. 74, 86 n.7. Reviewing the district court's May 2 order, which drew its substance from the Council's resolution, seems in no material respect different from reviewing a similar district court order which drew its substance from statutory provisions such as 11 U.S.C. §§557, 558. The latter task is our statutory duty under 11 U.S.C. §47. At least in a situation where there is a district court order capable of being reviewed, we see no reason, in the absence of any statutory provision, why the Council's actions are untouchable except by the Supreme Court, and we greatly doubt that that Court so thought when it declined to permit the filing of a petition for mandamus. *Nolan v. Judicial Council of the Third Circuit of the United States*, 1972, 409 U.S. 822. On this assumption we pass to the merits after, necessarily, a complex statement of the facts.[2]

THE APPEARANCE OF CONFLICT OF INTEREST

Appellant, Joseph M. Nolan, Esq., an experienced member of the bankruptcy bar, was appointed in February, 1966 as counsel for the trustee in reorganization of Imperial "400" National, Inc., a chain of motels doing business in thirty-five states. The trustee successfully continued the operation of the business, but acceptable plans

2. Still further facts may be found in the thorough opinion of the district court in the mandamus action. 346 6 F. Supp. 500.

for reorganization did not materialize. Two plans, although allegedly favored by many creditors, were opposed by the trustee through Nolan as his counsel.[3] On April 14, 1971, orally, and April 19 in writing, Nolan advised the district judge in charge of the reorganization, Hon. Robert Shaw, now deceased, that a client of his law firm, Schiavone Construction Company, was interested in filing a plan. Judge Shaw replied on April 21 by a letter, with copies to all creditors:

> "If a good plan of reorganization which is more fair, equitable and feasible than any heretofore submitted may be available by participation of Schiavone Construction Co., I do not think stockholders, creditors and other parties in interest should be deprived of the benefit of such plan by reason of the fact that Mr. Nolan represents that corporation in other matters."

He went on to state that the trustee himself had no conflict of interest, and was a well-qualified attorney capable of representing himself with respect to reorganization plans, and that accordingly he was ordering Nolan to "refrain completely from any participation therein," but to continue to represent the trustee in all other matters.

> "If it is felt by any interested party that this is not the appropriate way to proceed to gain the financing of Schiavone Construction Co., the Court will entertain and consider objections which, if any, should be promptly presented."

We will not pause to consider the oversolicitude, if any, the court exhibited towards the trustee's counsel vis-

3. Since delay in the approval of a plan of reorganization bears on the case, we note that the trustee's opposition to these plans was shared by the SEC, which found them unfeasible and unfair. CCH Bankruptcy Law Reports 64,496.

a-vis the estate. In any event, no one objected, and two affirmatively assented—Union Bank of Los Angeles, a large creditor, hereinafter Union Bank, and the SEC. The SEC wrote that because it felt "the estate should not be deprived of the possible benefits arising from Schiavone's participation" it had no objection to the proposed procedure; the bank concurred, with a similar statement. Thereafter New York counsel appeared for Schiavone, and Nolan continued to represent the trustee in a substantial amount of day-to-day legal work unconnected with reorganization plans.

THE CLIMATE

Pre-Schiavone

Thus no conflict of interest of a disqualifying nature was perceived, at least to the point of accepting the court's open invitation to speak up. We lay particular emphasis upon this not only because of its general significance, but because well before that date matters had not been going to everyone's satisfaction, and the parties had become engaged in recriminations on a markedly personal level. Union Bank was represented by one Lawrence W. Levine, Esq., who was also chairman of the creditors' committee. His vigorous attacks on the trustee and his counsel in connection with their requests for interim fees of which there were several, were characterized by the district judge at one point as "allegations of lack of integrity and suggestions that there is deliberate mismanagement of the estate." Nor did Nolan fail to respond in kind. The Court of Appeals had found one of the district court's fee allowances substantially excessive,[4] and doubtless the controversy was exacerbated when the district court, on receipt of the mandate, on March 10, 1971 excused the payment of interest on the amount obliged to be refunded.

4. *In the Matter of Imperial "400"* National, Inc., 3 Cir., 1970, 432 F.2d 232.

Post-Schiavone

In April, 1971, Nolan's new, in the sense of more limited, position was approved. Nothing occurred thereafter to cause the discovery that there was an impermissible appearane of a conflict of interest, except a continuation of personal differences. In the appeal taken from the district court's failure to assess interest, which Levine used as a vehicle to suggest Nolan's removal, ante, Levine filed an affidavit in 137 paragraphs attacking Nolan, and Nolan, in reply referred, *inter alia*, to "Levine's flow of nonsensical and scandalous statements." One of Levine's charges totally irrelevant to the question of interest on the refund was that Nolan had sued Union Bank for eight million dollars in order to induce the bank to drop its support of another plan and to favor Schiavone's. Ultimately the district court's fee decision was reversed again.[5]

The Court of Appeals did not enter into these controversies between the parties more than it could help.[6] However, in its 1970 opinion, the court spoke of "the friction which apparently exists," and "suggest[ed] that the trustee and his counsel make a greater effort to work with the creditors and other interested persons in an effort to terminate this lengthy reorganization proceeding with dispatch. . . . The main business of the trustee and his attorney at this point should be to press forward to an acceptable plan of reorganization, not to concentrate on their 'personal interests.'" 432 F.2d at 240-41 n.28, 29. Again, in the 1972 opinion, the court referred to the "widespread dissatisfaction with the failure of the . . . fiduciaries to secure action by the court on a reorganization plan." 456 F.2d at 931.

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5. *In re Imperial "400" National, Inc.*, 3 Cir. 1972, 456 F.2d 926.

6. The court did note on one occasion that the "briefs contain considerable material irrelevant to the issues presented by these appeals," 456 F.2d at 931-32, n. 15, a very modest description.

COUNCIL ACTION

On January 22, 1972, five days before the interest-on-fee-refund case was to be argued to a panel, Levine addressed a letter to the court, stating that while there was no motion filed to remove the trustee and his counsel, and while he did not wish time for oral argument on that subject, he felt the court "could exercise its equity power" to remove the trustee and his counsel, "which we hope it will and of its own volition." It does not appear what transpired at the argument, but thereafter two members of the panel, who had also been members of the previous panel, wrote a letter to the Chief Judge of the circuit. This letter is substantially quoted in the opinion of the district court, 346 F. Supp. 504-05. In substance it suggested that the Chief Judge "should at least suggest to the assigned district judge or Chief Judge Augelli that such counsel should withdraw as counsel for the trustee." The letter stated that even though Nolan was no longer advising with respect to reorganization plans, he did advise the trustee on all other matters, and that the public was unlikely to understand such action, particularly in view of the litigation over fees. "The fact that Schiavone Co. has New York counsel to represent them on the plan will not overcome, in the minds of laymen, the continuing representation of this company in all other matters by the Nolan . . . firm."

The factual accuracy of the letter is disputed by Nolan. The letter stated that the trustee was favoring the Schiavone plan, "even though a plan favored by many of the creditors had been submitted many months before the Schiavone plan and gives them cash, which is what they want." While one of the alternative plans did provide cash, the cash element was apparently inserted by amend-

ment after the Schiavone plan was filed.[7] Further interstices in the Council's knowledge will be touched upon later. However, the thrust of the letter was not to attempt to resolve the issues between the parties, but to eliminate them by summarily removing counsel, thus avoiding the "danger of adverse publicity affecting the entire federal bankruptcy system."

On February 10 the court, meeting as the Council, unanimously, except for two judges not voting, adopted the resolution in question. A month later the Chief Judge wrote to Judge Shaw, paraphrasing the resolution in general, rather than in its narrow terms, and suggesting that Nolan be given the opportunity to resign. The letter concluded,

> "I realize that this will be of real concern to you but I know you realize that some of the appeals in this case have caused much concern to the judges hearing them."[8] 346 F. Supp. at 514.

Judge Shaw replied that Nolan was unwilling to resign because he, and the Judge, felt it would be acknowledging a fault which was not recognized, and that they both felt that if there were to be a removal it should be for cause, as to which "Mr. Nolan insists . . . he is entitled to an evidentiary hearing." In further correspondence, in which the resolution was explicitly set forth, the Chief Judge continued "to emphasize that [the] resolution is directed

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7. We think the inaccuracy in this respect attributable to a misunderstanding by the judges of an earlier letter from counsel which we find in the record.

8. The dissent's suggestion that it was "altogether likely that [in the month prior to this letter] attempts were made informally to secure Judge Shaw's compliance" is, to us, contra-indicated by this language and further language quoted from the letter in n. 13, post, and finds no support in the record's extensive report of interchanges.

at the *appearance* of a conflict of interest. . . . We are talking policy." Since cause was not asserted, he repeated, there was nothing personal, and no hearing was called for.

Nolan continued to disagree. Ultimately this discussion was obliged to come to a halt, and with a detailed protest that he should not have been required to do so. Judge Shaw on May 2 terminated Nolan's retainer. Attempts to obtain an interim stay pending appeal failed,[9] and ultimately the present panel of senior circuit judges from outside the circuit[10] was designated by the Chief Justice.

THE POWERS OF THE COUNCIL

28 U.S.C. §332 provides as follows,

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

Appellant contends that "this statute, as written and as employed is unconstitutional." As to the first, his brief is singularly unpersuasive. It cannot be unconstitutional to authorize the courts to manage their own business. It is doubtless true, as the Court pointed out in *Chandler v. Judicial Council of the Tenth Circuit*, 1970, 398 U.S. 74, 85 n.6, that the statute "is not a model of clarity in terms of the scope of judicial councils' powers," but we believe this lack merely raises issues of construction. As to this innumerable authorities with diverse qualifications have

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9. *See* 346 F.Supp. at 507.

10. We note that two members, as former chief judges, headed their own councils for 11 and 8 years, respectively. The panel took immediate steps to expedite the hearing of the appeal.

asserted that the phrase "effective and expeditious administration of the business of the courts" is to be broadly construed. *See* Brennan, The Continuing Education of the Judiciary in Improved Procedures, 28 F.R.D. 42, 43 (1962); Burger, The Courts on Trial, 22 F.R.D. 71, 74-77 (1958); Hearings on H.R. 2973, H.R. 5999 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess., 22 (1939) (remarks of Judge John J. Parker); Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203, 206 (1970). The reasons seem clear. The individual district judge has his own docket to consider, and his own problems. There must be a body with a broader horizon, and a broader responsibility, to oversee the district court as a whole, not just in regard to day-to-day operations and internal problems, but in the larger perspective of the court's place in the body politic.

Nowhere has the present aspect of that duty been better expressed than in a Report of the Judicial Conference of the United States at its June, 1961 meeting on the Powers and Responsibilities of the Judicial Councils, presented to the House Committee on the Judiciary by the Honorable Emanuel Celler, Chairman, 87 Cong., 1st Sess., H.D. 201. Included in the Conference's conclusions is the following.

> "(2) The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts."

We note in this connection that Chairman Celler stated in his Foreword,

> "Since I, at the time [that section 332 of Title 28 was enacted] was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice."

We have no question but that there is included in this area the important matter of conflict of interests.

Nor do we accept appellant's contention that a judicial council lacks rule-making power. His argument that this would destroy uniformity flies in the face of the fact that every court of appeals, not to mention many district courts, has its own local rules. The caveat is that such rules must not conflict with rules that have been made effective nationally. *See In re Mandell*, 2 Cir., 1934, 69 F.2d 830. If a court of appeals may make rules for itself, we see no reason why a judicial council, sitting as an administrative body, cannot, short of exercising traditional judicial functions, *see* post, enact appropriate rules, or resolutions, applicable to all courts within its circuit. *See, e.g., United States ex rel. Frieer v. McMann*, 2 Cir., 1971, 437 F.2d 1312, 1317 (issuance of rules covering prompt disposition of criminal cases). This, however, does not answer the present question.

THE RESOLUTION IN CONTEXT

In spite of the foregoing, we are deeply troubled by what occurred in the present case. The fact that the resolution worked individual hardship to appellant is not de-

terminative. Rules, and the maintaining of public relations, *cf. Barr v. Mateo,* 1959, 360 U.S. 564, 574, may often work individual hardship.[11] Nor is it necessarily determinative that the resolution was occasioned by a particular situation. General rules must often be made in response to some event that calls attention to their need. The difficulty here is that the Council was not alerted to any general need. Although not so couched, the resolution was not only triggered by, but tailored to, a case quite apparently unique. The SEC, which has statutory supervison of Chapter X reorganizations, 11 U.S.C. § 608, informs us through its Solicitor that it has never heard of a case other than the one at bar that would come within this resolution. Nor have we been able to discover one. The action accordingly comes uncomfortably close, perhaps too close, to a function denied to the Council, the exercise of "traditional judicial powers." *Chandler v. Judicial Council,* 398 U.S. 86 n.7.

What particularly troubles us in these circumstances is that some members of the body adopting this, in effect, in personam resolution had been exposed to highly defamatory accusations against appellant, had been themselves "much concern[ed] by the appeals, and had expressed by no means insignificant criticisms. Moreover, the only information presented to the Council as a whole was, in its factual aspects, both inaccurate and incomplete. Viewed from the standpoint of appellant, it must be thought ironic that at, or at least following, the suggestion of his antagonist, he should be condemned unheard by a body whose very excuse for acting was the necessity of main-

11. As a small example, we note the recent case of *Lipman v. Massachusetts,* 1 Cir., 1973, — F. 2d —, which involved a state court denying a court reporter the customary opportunity to profit by selling copies of transcripts to the public.

taining public confidence in the fairness of the courts. The explanation that he was not being discharged for cause, but only for the appearance of a conflict of interest, could be less than satisfying, especially so since in the year between Judge Shaw's letter to the creditors and the Council's action it was only the substantive attack on Nolan, and not the conflict of interest situation, that had changed. Even when the decision was unquestionably for appearances only, and the atmosphere was entirely devoid of personal criticism, a far cry from the present case, such assurances are not always found convincing. See dissenting opinions in *Rapp v. Van Dusen*, 3 Cir., 1965, 350 F.2d 806.

The circuit council is a valuable arm of the courts, and nothing we say in this opinion should be taken as denigrating its great importance. But like any administrator we believe its success may be measured by its lack of visibility. We suspect that some who have criticized councils for inactivity are unmindful of the saw that still waters run deep, and that the most effective actions are often the most inconspicuous. But, conversely, we think nothing would furnish potential critics of the circuit council with ammunition more than would over-action. As one member of the present panel has wisely stated, "Those who comprise the councils must do the work by example, leadership, and persuasion. The making of orders and their publication should be the last resort, rather than the first." Lumbard, The Place of the Federal Judicial Councils in the Administration of Justice, 47 A.B.A.J. 169 (1961).

THE APPROPRIATE PROCEDURE

If an order was necessary, the circumstances demanded procedural protection for Nolan. As the Court stated in Goldberg v. Kelly, 1970, 397 U.S. 254, 262-63, appropriate procedural protection depends on the nature of

the injury to the grievant and whether the latter's interest in avoiding the injury "outweighs the governmental interest in summary adjudication." The consequences to appellant—not to mention the estate—were drastic, particularly in the light of the atmosphere of charges of misconduct. Moreover, summary action by the Council was manifestly unnecessary. There was no need of a rule; Nolan (or, quite possibly, Levine), was the problem. There was no reason, even timewise, as the chronology makes clear, why there could not have been a hearing. Indeed, we suggest that summary action in the circumstances of this case, rather than serving any important governmental interest, constituted an inadvertent disservice to the concept of circuit councils. While this was not as serious as a disbarment, *cf. In re Ruffalo*, 1968, 390, U.S. 544, and Nolan did not have, perhaps, the equivalent of tenure, *cf. Perry v. Sindermann*, 1972, 408 U.S. 593, we note Mr. Justice Harlan's statement, concurring in *Chandler v. Judicial Council*, ante, 398 U.S. at 127.

> "There is much in our tradition of due process of law that runs counter to the taking of serious action on the basis of *ex parte* assertions or suspicions of misbehavior."[12]

We would be more moved by the dissent's assertion that the "Circuit Council was in the best position to determine what measures should be taken" if it had followed that advice.

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12. The dissent's suggestion that Nolan might have asked for reconsideration by the Council, we regard as unrealistic. It is true that he could have asked. In the light, however, of the detailed response, ante, to Judge Shaw's letter protesting Nolan's removal without a hearing, we cannot think that a further request, however put, would have been productive.

We might also feel differently if the resolution was an inevitable truism, as the dissent apparently suggests. But while we agree with the dissent's general discussion of conflict of interests, we feel that the issue as it relates to bankruptcy proceedings is a good deal more complex. There is no doubt but that the limitations imposed by Judge Shaw upon Nolan's retainer did not, in fact, eliminate all appearances of a possible conflict of interest. Indeed, we regard Nolan himself as so conceding during oral argument. The SEC fully conceded it, but stated it had accepted the situation after a "balancing of several considerations." In brief, the SEC believed that the conflict of interest problem was outweighed by the potential delay in the proceedings caused by removal of an officer who, over a period of five years, had accumulated substantial familiarity with the estate. The Council's action was taken without knowledge of this position of the SEC.[13]

The SEC's pragmatic stance was consistent with the bankruptcy law; complete disinterestedness is not required in all aspects of bankruptcy proceedings. *Cf. In re Eloise Curtis, Inc.*, 2 Cir., 1964, 326 F.2d 698. For example, 11 U.S.C. §557, which provides that the attorney for the trustee must ordinarily be disinterested, contains a proviso, "that for any specified purpose other than to represent a trustee in conducting the proceeding under this chapter the trustee may, with the approval of the judge, employ an

13. We do not find that the Council was even aware of the extent that the district judge in charge of the reorganization had conferred with the creditors. In his original letter to him, the Chief Judge referred to "your actual or tacit approval," a phrase we would think inconsistent with such knowledge. Instead, as the dissent significantly remarks, it was "aware that on two occasions creditors had objected that the district judge had been overgenerous to the trustee and his counsel regarding fees."

attorney who is not disinterested."[14] The present case could be thought to be an unusual, but nevertheless, permissible application of this statute: Nolan was employed for the special purpose of conducting the very complicated day-to-day operations of the estate, short of the plan of reorganization, with which he had become experienced and proficient.

We do not affirmatively adopt this position; we point it out merely to show that the Council's resolution was not the only valid perception. Not only did the district court feel differently, but so, apparently, did every creditor when the issue was first presented. While we agree with Union Bank that it should not be "estopped" by its initial acquiescence in the court's proposal, we cannot disregard its evidentiary effect. And, finally, we must give especial weight to the SEC, an impartial body experienced in these matters.

By this we do not mean that the SEC was right, or not right. But given this situation, the Council could easily have suggested a district court hearing on the issue of appellant's continued service, the hearing to include the sort of balancing adopted by the SEC. *Cf. In re Pittsburgh Rys. Co.*, W.D.Pa., 1948, 80 F.Supp. 15.[15] A district court could have made a determination on a full record with, if desired, appellate review, and this would have solved the

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14. *Compare* 11 U.S.C. §72(c): "An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor." Section 72(c), primarily a general bankruptcy provision, applies to reorganization proceedings, but is modified in that context by section 557 and section 558. *See* Dodd, Exchange Commission Reform Program, 38 Colum.L.Rev. 223, 230-231 (1938). *Cf.* 11 U.S.C. §556.

15. If, in the light of *Chandler*, it could be thought not a forbidden in personam judicial decision, the Council could have conducted a hearing itself. *Cf. In re Rodenbaugh*, 1950, 10 F.R.D. 207. The Council did conduct a hearing in *Chandler*.

problem consistently with the interests of the parties and the Council's purpose of protecting the integrity of the court system.

We remand the case to the district court for a hearing as to whether, viewed as of the present, Nolan should be re-engaged as counsel for the trustee. Since substantial time has passed since his removal, the district court should weigh the conflict of interest problem as it now stands against the beneficial—or harmful—effects of re-engaging appellant at this point in the reorganization. At such hearing, if they so desire, creditors may also raise the question whether matters had reached a point where appellant because of his conduct or the appearance of a conflict of interest, or both, should have been removed for cause. Appellant has no right to recover for loss of any fees which he might have earned, regardless of how it came about that his retainer was terminated.

In No. 72-1920 the order of the district court is affirmed. In No. 72-1566 the matter is remanded to the district court for further proceedings consistent with this opinion. No statutory costs in No. 72-1920, but appellant shall recover all costs in No. 72-1566, including the cost of his entire consolidated brief and appendix, to be charged against Union Bank.

LUMBARD, Circuit Judge (dissenting).

I dissent. The appeal from Judge Shaw's order should be affirmed. As to the appeal from the district court's dismissal of Nolan's petition for writ of mandamus, I would

affirm because in my opinion a district court is powerless to entertain a petition to mandamus the circuit council.[1]

In making his order of May 2, 1972, which terminated the services of Joseph M. Nolan as attorney for the trustee, Judge Shaw carried out the following resolution of the Circuit Council for the Third Circuit:

> "RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest."

This resolution of the Circuit Council was binding on all the district courts of the circuit and on all officers of those

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1. With all respect to the circuit judges of the Third Circuit, I suggest that the active circuit judges should not have recused themselves from hearing these appeals; instead, they should have sat as the Court of Appeals en banc. Thus the same judges making the order under attack would have heard the appeal. They could have held a hearing forthwith, or not, as they decided. The judges would be sitting in a dual capacity—as a court of appeals sitting en banc and as the circuit council. The business of supervising the district courts and their officers is for the active circuit judges of the circuit. When they order something to be done, in the exercise of their section 332 powers, it is their duty to see that it is done; whether on appeal or by review of the denial of a petition for mandamus. In any event, such action ought not to be viewed as a cause of disqualification, even though those affected by the order ask for it.

It is to be hoped that the action of the circuit judges of the Third Circuit in recusing themselves will not be followed by other circuits. Nothing could be more destructive of supervisory authority than to have cases such as this passed upon by circuit judges from another circuit. Subject only to corrective action by the Supreme Court, circuit council action should be followed by speedy compliance, as the statute contemplates; it should not be permitted to spawn litigation and delay beyond what the circuit council may determine to allow.

district courts, which included counsel for trustees in reorganization proceedings, such as Joseph M. Nolan. The order of the Council was and is the law of the circuit.

Admittedly the Circuit Council order of February 10, 1972 was intended to apply to this appellant Nolan. It is undisputed that there was pending and under consideration by the district court, the trustee, and the creditors, an offer for reorganization of the debtor corporation made by Schiavone Construction Company, which, since November, 1965, had been a client of the law firm of Nolan & Lynes of which Nolan was the senior partner. It follows that Nolan could no longer continue to serve as counsel to the trustee. Consequently, we should affirm Judge Shaw's order of May 2, 1972.

No district judge or panel of the Court of Appeals for the Third Circuit, no matter how constituted, has the power to question the action of the Circuit Council of the Third Circuit. The circuit judges of the Third Circuit have spoken, in accordance with powers conferred on them acting as a Circuit Council. It would be altogether incongruous for any lower court or single panel of judges in the Court of Appeals for the Third Circuit to pass upon whether what the Council has done is a lawful and proper exercise of the Council's powers. There is no statutory authority or precedent for such review.

Appellant's only recourse was a petition to the Circuit Council to review its action or a petition for mandamus to the Supreme Court. Although the majority opinion in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), which is the only Supreme Court case that has considered the power of the circuit councils thus far, did not reach the question of whether the Supreme Court had jurisdiction to issue a writ of mandamus to a circuit council, Justice Harlan, in a separate concurrence, found that

the Supreme Court had jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to entertain petitions for mandamus. Justices Black and Douglas, though dissenting from the majority's disposition of the case, agreed with Justice Harlan that the Supreme Court had jurisdiction.[2]

At the same time, on the merits I am convinced that the action of the Circuit Council was well within its powers and that the appellant has no basis for complaining that in directing the termination of his services he was deprived of due process of law.

The order of the Circuit Council was an entirely proper exercise of its powers under 28 U.S.C. § 332 to supervise the conduct of business in the district courts and the manner in which officers of the court should conduct themselves so that public confidence in the impartiality of the courts and their officers should not be impaired. As was conceded at oral argument, the continuance of Nolan as counsel to the trustee while there was pending for consideration a plan of reorganization suggested by a client of Nolan's firm presented the appearance of a conflict of interest. It seems clear to me, as it did to the Circuit Council, that the appearance of impropriety could not be cured by an announcement that Nolan would not advise regarding the offer of his client; the appearance of a conflict would persist so long as he continued in daily service to the trustee.

The Circuit Council was in the best position to determine what measures should be taken to offset the obvious stigma which would have tainted the proceedings if Nolan had continued as counsel. The power to make orders was

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2. It must be noted, however, that on October 11, 1972, the Supreme Court denied without opinion appellant's petition for leave to file a Writ of Prohibition and/or Mandamus directed against the Circuit Council for the Third Circuit, 41 U.S.L.W. 3189 (U.S. Oct. 11, 1972).

given to the circuit councils precisely because they are in the best position to decide what corrective steps should be taken when such situations are brought to their attention. Here several members of the court had recently been alerted to the situation because they had heard appeals from orders of Judge Shaw in the same proceeding, 432 F.2d 232 (1970) and 456 F.2d 926 (1972).

We must look to the circumstances surrounding the enactment of § 332 and the operation of the circuit councils in the performance of their supervisory powers since 1939 in order properly to evaluate the order of the Third Circuit Council. I think such an inquiry demonstrates that the councils were intended to exercise the broadest powers with respect to supervising the administration and conduct of the district courts including district judges and officers of the court, in order to promote efficiency and proscribe any activity which might impair public confidence in the proper and impartial administration of justice. Moreover, it was intended that the councils should use these powers in whatever manner seemed best calculated to deal with particular situations.

Until 1939 there was no means of supervising the administration of the district courts, or the activities of district judges or officers of the district courts, apart from determining questions raised in litigated cases. By then the need for more immediate and constant control had become clear. Chief Justice Hughes voiced the feeling of the Supreme Court that such power should not be centralized in that Court. He said to the Judicial Conference in September, 1938:

> "Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a

concentration of responsibility in the various circuits —immediate responsiblity for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.

Now we have had in the States considerable effort in this direction through the appointment of judicial councils. * * * My thought is that in each circuit there should be an *organization which will have direct and immediate responsibility with regard to the judicial work in that circuit.* [Emphasis supplied.]

My suggestion for your consideration is that there should be in each circuit a judicial council. * * *

* * * * *

When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervison of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice."

Judicial Conference of the United States, Report on the Powers and Responsiblities of the Judicial Councils, H.R. Doc. No. 201, 87th Cong., 1st Sess. 3 (1961).

Thus was born the idea of making the circuit councils the vital centers for supervision and corrective action. A Committee of the Conference then collaborated in the preparation of legislation, which was passed after hearings before congressional committees at which testimony was given by members of the Judicial Conference, notably Chief Judge Groner and Chief Judge Parker. Judge Groner said:

> "Under the present judicial setup we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, *or properly could be made the subject of criticism for which he may be responsible* . . . [emphasis supplied.]"

H.R. Doc. No. 201, *supra* at 5.

Before the House Judiciary Committee Judge Parker gave the following testimony, which is quite revealing on the question of what power the circuit councils were intended to have:

> "JUDGE PARKER. This (council) can deal with all sorts of questions that arise in the administration of justice.
>
> MR. CELLER. Do you put any restraint on the council at all?
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> JUDGE PARKER. I do not think this bill does. Of course. I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he

would refuse to do it, and that would probably be the end of the matter."

H.R. Doc. No. 201, *supra* at 5.

The Judicial Conference draft became law in August, 1939. The relevant part of §332, as it has read since a 1948 rearrangement which made no substantial change, provides as follows:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the circuit council."

In recent years the circuit councils have been frequently criticized because they have not made greater use of their powers. The appearance of inactivity has arisen largely because much of the supervision by the councils has been accomplished informally and not by written or published order; it has been done by telephone or private interview. In almost every case the fact that the circuit council had the power to make orders has rendered it unnecessary to do so in a formal way. A suggestion from the chief judge or one of the circuit judges almost always has gained ready compliance. Rarely have the councils found it necessary to enter a formal order. Even more rarely has any order been published. And until this case arose, Chandler v. Judicial Council of the Tenth Circuit, decided by the Supreme Court in 1970, 398 U.S. 74, is the only reported case wherein action by a circuit council has been questioned.

Meanwhile, questions concerning the operation and powers of the circuit councils have been frequently considered by the Judicial Conference and its committees. In March, 1961 the Judicial Conference adopted a Report on

the Powers and Responsibilities of the Judicial Councils which detailed the background of §332 and its legislative history and set forth certain conclusions, of which the second is specially relevant here:

> "(2) The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts."

H.R. Doc. No. 201, *supra* at 8-9.

The report also concluded that §332 was "adequate to enable the judicial councils, on proper exercise of their responsibilities, . . . to assist in achieving 'the effective and expeditious administration of the business of the courts.' " Id. at 9.

The Judicial Conference Report was printed in July, 1961, as House Document 201, 87th Congress, 1st Session, with a foreword in which Emanuel Celler, then Chairman of the Judiciary Committee, stated:

> "Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an adminis-

strative character to maintain efficiency and public confidence in the administration of justice."

The Report also shows that it was the expectation of those judges who recommended placing responsibility in the circuit councils, and also of the Congress, that the councils, in exercising their powers under § 332, would in most cases be able to operate informally and without the need of transmitting and publishing written orders.

In my opinion, the Circuit Council had the power to require that any officer of a district court could continue to act as such officer only so long as is so acting did not raise any serious question of the fairness and impartiality of the consideration of the court's business. When Nolan's client filed a plan for reorganization it was immediately obvious to all concerned that Nolan could not continue to give any counsel regarding reorganization plans. Judge Shaw thought it was enough to announce that Nolan would not advise regarding that plan. Quite understandably the Circuit Council differed. Since the Circuit Council has the power to supervise the administration of the district courts, and has the responsibility to do so in a way designed to maintain public confidence in the administration of justice, its order must prevail. While the record is silent on what if any overtures were made to Judge Shaw before the matter was discussed at the February 10, 1972, meeting of the Council, and during the interim before Chief Judge Seitz's letter of March 10, 1972, it seems altogether likely that attempts were made informally in order to secure Judge Shaw's compliance. When these informal approaches failed, the Council had no choice but to direct compliance forthwith.

Having been advised of the order of the Council by the proceedings before Judge Shaw which culminated in his order of May 2, 1972, Nolan's only recourse, other than to

file a petition for mandamus in the Supreme Court, was to petition the Council for reconsideration of its order.[3]

The public and and the bar demand of the federal judiciary and its officers adherence to the highest standards of conduct. Cf. ABA Code of Judicial Conduct Canon 1 (1972).[4] Not only must matters be handled fairly and impartially by judges and officers of the courts, there must not even be the appearance of possible unfairness and partiality. Cf ABA Code of Judicial Conduct Canon 2 (1972); ABA Code of Professional Responsibility Canon 9 (1969). See the Report of Proceedings before the Judicial Conference of the United States for October 31 and November 1, 1969, Annual Report of the Administrative Office of the United States Courts, 1969, pp. 50-52, and the Report of Proceedings before the Judicial Conference of the United States for March 16, 1970, Annual Report of the Administrative Office of the United States Courts, 1970, pp. 6-9, particularly the statement required to be filed by judges every six months listing participation in any cases where the judge knew at the time that he or any member of his immediate family in his household had any financial interest in any of the parties. The result is that a federal judge almost always disqualifies himself if he, or any member of his immediate family, has any interest whatever, no matter how small, in any of the parties involved in litigation before the court. See also 28 U.S.C. §455.

---

3. That Nolan was fully cognizant of his opportunity to petition the Circuit Council for reconsideration is evident from a reading of his Petition to the Supreme Court for Writ of Prohibition and/or Mandamus which states at page 21 that "Petitioner in this case does not know whether he is required to seek relief in the Court of Appeals . . . , or before the Judicial Council."

4. On April 6, 1973 the Judicial Conference of the United States adopted the ABA Code of Judicial Conduct as the standard for federal judges with minor modifications not here relevant.

There is no reason why similarly high standards should not be required of the officers of the federal courts, including counsel to a trustee in a bankruptcy reorganization. Canon 9 of the American Bar Association Code of Professional Responsibility states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Accompanying Canon 9 is Ethical Consideration 9-6[5] which states: "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and *to strive to avoid not only professional impropriety but also the appearance of impropriety.*" [Emphasis added]

Canon 5 of the Code states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-15 amplifies this general language: "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment. *He should resolve all doubts against the propriety of the representation.*" [Emphasis added]

The spirit of the Bankruptcy Act is entirely consistent with these policies. For example, section 157 provides generally that before an attorney can be appointed to represent a trustee he must qualify as a disinterested person. 11 U.S.C. §556. Section 158 defines interested persons to in-

5. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." ABA Code of Professional Responsibility: Preamble.

clude those who "for any reason [possess] an interest materially adverse to the interests of any class of creditors or stockholders." 11 U.S.C. §588. One commentator has noted that "this [clause] has rightly been termed a 'catch-all clause,' and it seems broad enough to include anyone who in the slightest degree might have some interest or relationship that would even faintly color the independent and impartial attitude required by the Act." 6 Colliers on Bankruptcy ¶708(5), at 1186 (14th ed. 1972) (footnotes omitted). At the time that Judge Shaw removed Nolan, he clearly fell within the definition of interested persons contained in section 158. Furthermore, section 158 "provides a *minimum* standard for the guidance of the judge in his appointments and insures that persons employed as trustees and their attorneys in the conduct of Chapter X proceedings shall have that character of independence and disinterestedness which was considered one of the chief aims of Chapter X"; and even if a person's associations do not come within the literal purview of section 158, a judge can reject him if his associations are "prejudicial to disinterestedness." 6 Colliers on Bankruptcy ¶7.08[1], at 1180-81 (14th ed. 1972) (emphasis added) (footnotes omitted). Thus, it is apparent that the same concerns which are embodied in the Code of Professional Responsibility are also present in the statutory scheme governing corporate reorganizations under the Bankruptcy laws.

However, it is no answer to say, as the majority does, that perhaps Nolan could have been appointed attorney for the trustee by the district court in any even because §157 contains a proviso which allows the appointment of an interested person for purposes other than "to represent a trustee in conducting the proceeding under this chapter." 11 U.S.C. §557. This proviso does not detract from the validity of the Circuit Council's action; it provides at most

a very limited exception to the statutes' general prohibition against the employment of interested persons in reorganization proceedings. Morover, what it at issue here is not the power of the district court in the exercise of its normal discretion concerning the everyday administration of the bankruptcy courts, but the much more far-reaching authority of the Circuit Council to take corrective action in affairs of judicial administration when it becomes aware of a conflict of interest which presents an appearance of impropriety to the public and which may undermine the public's confidence in the judiciary.

When several of the circuit judges advised the Circuit Council that one of Nolan's clients was proposing a plan for reorganization and that Nolan would still continue to act as counsel, although he was not to be heard from regarding that plan, the Council unanimously concluded that Nolan's continuing as counsel would be highly improper as it would give the appearance of a conflict of interest which could be avoided only by his retirement.

Apparently, informal overtures to Judge Shaw, if any, were unsuccessful. Both the judge and Mr. Nolan thought that Nolan could continue as counsel as to all other matters as long as the creditors were informed that he was not advising regarding the Schiavone plan. The circuit judges were already aware that on two occasions creditors had objected that the district judge had been over-generous to the trustee and his counsel regarding fees. Nolan's continuance as counsel on any basis while the Schiavone plan was being considered would obviously raise very serious questions about possible conflict of interest and might lead to further litigation and more appeals.

The circuit judges were concerned that public confidence in the administration of the bankrupt estate would be shaken unless measures were speedily taken; quite prop-

erly they acted without delay. How can we or anyone else question that the Council was well advised and in the best position to estimate the effect which Nolan's continuance would have on public confidence in the administration of justice in the reorganization proceeding? The adoption of a rule which would settle the Nolan matter and at the same time guide the district courts against a similar situation in any other bankruptcy proceedings was entirely proper. It avoided any judgment which would reflect adversely on Nolan's acts while counsel; it merely announced a principle which must be applied to all such situations and as such it was circulated in April 1972 to all the chief district judges of the Third Circuit.[6]

The relevant facts were not in dispute; it was the measures required to maintain public confidence which were contested. The Council concluded, with good reason, that the impasse could be resolved by the order which it adopted. I do not see how there can be any question that the order of February 10 was an order which was necessary for the effective administration of the business of the district courts in the Third Circuit. In any event this order was well within the statutory powers of the Circuit Council.

After being advised of the resolution Nolan could have petitioned the Council for reconsideration of its order. There is no reason to believe that he would not have been heard had he come forward with any facts or arguments not already known to and weighed by the Council. Failing this, with such respite as the Council would have granted to review the matter, Nolan as an officer of the court was bound promptly to carry into effect the order of the Council, just as Judge Shaw was required by the express language of §332 promptly to comply with the order of the

6. See Plaintiff's Complaint, Appendix to Appellant's Brief at 55a-56a.

Council. Nolan had no greater standing than the district judge; his duty to comply promptly was just as clear.

Thus I can see no due process requirement that Nolan be given further notice and a hearing. Nolan asked for no more process or hearing until Judge Shaw finally acted on May 2, 1972. On that same day Nolan filed his action for declaratory judgment in the district court.

In the light of the legislative history of §332 and its purpose, as commonly understood, and its subsequent use by the circuit councils, the exercise of council powers is an act of judicial administration. The power is given to the councils as a necessary means of supervising the administration of justice in the federal courts of each circuit. The councils must determine to what extent consultations, notice and hearings are necessary depending on the circumstances of each situation. What is thought necessary or desirable will vary with each occasion. Where it is thought that rules are needed to speed court business and that those most concerned can be helpful, and should be heard to suggest and discuss proposed rules, the council can provide for consultation and a period of time before the proposed rules become effective. This was done by the Circuit Council for the Second Circuit in the course of promulgating Rules Regarding Prompt Disposition of Criminal Cases, which went into effect July 5, 1971 after ten months of discussions which commenced in September, 1970. See United States ex rel. Frizer, 437 F.2d 1312, 1317 and 28 U.S.C.A. (Supp. 1972). These Rules preceded the adoption of F.R.Crim.P. 50(b).

But where the principle is clear, the facts are undisputed and the need is immediate, the council may act quickly and require immediate compliance. That is this case. Were the requirements otherwise, so that litigation might easily frustrate and delay salutary action, much of

the power and the ability of the councils to function would be rendered uncertain and ineffective. It is sufficient safeguard that any action of a circuit council may be brought to the attention of the Supreme Court for correction by mandamus. See opinion of Mr. Justice Harlan in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 89-129.

For the reasons above stated, I would affirm Judge Shaw's order of May 2, 1972, and I would affirm Judge Thomsen's order. Were I to reach the merits, I would hold that the order of the Circuit Council and the manner of its being effected were altogether proper.

APPENDIX B

Memorandum and Order on Petitions for Rehearing

ALDRICH, *Senior Circuit Judge.*

The petition for rehearing filed on behalf of the Circuit Council appears to misunderstand fundamentally the narrow scope of our decision. In the first place, it neglects that, as we pointed out, and as Judge Lumbard in his dissent recognized, the Council's rule, regardless of its form, was designed for Nolan. Nor did we say that we wished to substitute our view of the proper decision for that of the Council. Quite the contrary, our disagreement was basically with procedure; adding, to show that the issue was not moot, that there was another legally possible solution. It is not helpful to have a petition that does not direct itself to what we decided.

Secondly, we do no feel it appropriate, or helpful, to go off the record by referring to alleged ill-health of the district judge (which would in no way eliminate the alternative expressly before the Council, as pointed out by us, of referring the matter to the chief district judge for a hearing); or, more important, by stating that the Council members would aver they were not, in fact, influenced by the charges made against Nolan, and that some did not know all of them. Again, counsel misunderstands our opinion. We thought we made it clear that what troubled us was that serious charges had been stated to at least two members of the Council, who, for all that was known, might be expected by Nolan to repeat them, (even the understandably abbreviated record of the Council meeting refers to the "friction between counsel . . . certain creditors"), and

who publicly "had expressed by no means insignificant criticisms of appellant," of substance, not appearance.

We have no doubt that all members of the Council, in utmost good faith, sought to disregard whatever charges they knew or believed, and to address themselves to the issue. But we can only repeat, what counsel conspicuously ignores, that on this record, for a directive needed by no one except perhaps Nolan, Nolan was "unheard by a body whose very excuse for acting was the necessity of maintaining public confidence in the courts." The harm to Nolan was serious; any offsetting advantages, minimal. We spoke in terms of fairness and due process, and we adhere to that position.

With regard to the Council's present assertion that *Chandler* v. *Judicial Council*, 1970, 398 U.S. 74, indicates that we lack jurisdiction, the Council took the opposite position before the District Court in the mandamus proceeding, 346 F.Supp. 500, 511, before the Supreme Court in the brief which led to the denial of appellant's motion for leave to file a petition for mandamus, 409 U.S. 822, and again in its original brief before us. *Chandler* was decided long before all of those occasions. Perhaps the Council's present position is correct, but we have already considered it fully, and will not again.

We will deal briefly with the suggestion, also made for the first time, that remand for a hearing should be made to the Council, not to the district court. We respectfully wonder whether the Council really wishes that disposition, in the light of the truly district court nature, as well as the extent, of the matters we believe are to be heard, and of the fact that the Council, unlike the district court, is not au courant with the affairs of the case. In any event, we cannot feel, again with the greatest of respect, that, where there are two possible bodies, the Council is at this point the

appropriate one. This is not to suggest that the regular members of the Court of Appeals may not properly review the district court's decision once there is a full record.

The petition for rehearing filed on behalf of the Union Bank calls for no separate comment. We made the charge of taxable costs to that party because of its extraordinary and persistent disregard of the record and of the limited issue that was before us.

We make the following minor corrections in our opinion.

Page 5, strike out the last line of the full paragraph and substitute, "trustee from paying interest on the amount obliged to be refunded, but not Nolan. Nolan appealed and the creditors crossappealed.

Page 8, line 10, 514 should be 515.

Page 12, line 5, quotes should close after "appeals."

Page 15, second paragraph, strike first two words, "By this," and substitute, "Again."

Page 15, line 6 of second paragraph, 80 F. Supp. 15 should be 14.

Page 15, fn. 14, enlarge citation to Dodd to terminate, "*See* Dodd, The Securities & Exchange Commission's Reform Program for Bankruptcy Reorganizations, 38 Colum. L.Rev. 223, 230-31 (1938). *Cf.* 11 U.S.C. § 556.

The petitions for rehearing are denied

Judge Lumbard dissents and votes to grant the petitions for rehearing for the reasons stated in his dissenting opinion.

APPENDIX C

Opinion Sur Petition for Rehearing in Banc

(Filed June 13, 1973)

SEITZ, *Chief Judge.*

Petitions for rehearing have been filed by the intervenor, Judicial Council and by the Union Bank. Under Third Circuit procedures these petitions are appropriately considered both by the panel making the original decision and by the judges constituting the court in banc. "Preparation and Circulation of Opinions and Procedure For Hearing and Rehearing In Banc (Third Circuit)," Par. 9(a) and (b).

The petitions were therefore referred to the panel, and its majority has denied rehearing before the panel. Since the panel consisted of senior circuit judges from other circuits, they, of course, are not eligible to vote on the petition insofar as it seeks rehearing in banc. 28 U.S.C. § 46 (c) (1971). The petitions have now been circulated to the six active judges[1] of the court for in banc consideration.

We are confronted at the outset with our previous decision to recuse ourselves in this litigation. We are now constrained to consider whether, in light of the language in footnote 1 of Judge Lumbard's dissent and the issues of exceptional importance presented in the petition, F. R. App. P. 35(a), we should continue to recuse ourselves in the processing of the petitions insofar as they seek in banc action.

Some of the important issues are:

1. Does either the District Court or the Court of Appeals have jurisdiction to invalidate action taken by the Council under its rule making power?

---

1. Two active judges have disqualified themselves throughout for a reason other than their membership on the Council.

2. Assuming jurisdiction, was it permissible for the Court of Appeals to make a judgment in this case, contrary to the Council's, that there was no need for a Council Rule, and invalidate it on that ground?

3. Assuming, contrary to the panel's decision, that the Rule is valid, is it invalid as applied to Nolan?

We believe the issues presented warrant rehearing in banc. Nevertheless, we have decided that we should adhere to our previous decision to recuse ourselves. We do so because we originally recused ourselves solely for appearance sake, and we would not want it to appear that we have changed our position as a result of the opinion of the panel majority. Moreover, we are hopeful that the Supreme Court will see fit to review this important matter, especially since we are impelled to recuse ourselves from sitting in banc on these petitions. If it should decide that it was error for us to recuse ourselves solely because we were members of the Council, we would of course, on remand, act on the petitions insofar as they seek to have the court convened in banc.

The participating members of the court have authorized me to enter orders denying the petitions for rehearing in banc with recitals showing that they are being denied since such judges have recused themselves from voting on the petitions solely because of their Council membership.

FILED
AUG 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-204

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
Petitioner,

v.

JOSEPH M. NOLAN,
Respondent.

BRIEF FOR RESPONDENT JOSEPH M. NOLAN IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

(1) There are significant unresolved issues concerning the authority and procedures of judicial councils. Those issues were rendered irrelevant by the opinion on appeal in this cause. Contrary to the underlying assertions in the Petition filed by the Judicial Council of the Third Circuit (Council), the Special Panel of the Court of Ap-

peals did not set aside or otherwise disturb the rule adopted by the Council. There was criticism of Council action in the opinion below, but not as to the content of the rule, or the authority of the Council. The criticism was directed to the procedures or absence of them used by the Council in adopting and enforcing its rule. Two judges who voted for the resolution had expressed opinions on the subject before the rule was considered; the resolution was passed without benefit of any hearing, record or objective fact finding; and the resolution was based upon erroneous, disputed and inflammatory information. No notice of its adoption was given to Nolan although he was the target of the Council's action, and its enforcement was insisted upon by dunning private correspondence directed to the Judge of the District Court. The District Court Judge who had handled the Chapter X reorganization proceedings since their inception was compelled to dismiss Nolan as attorney for the trustee without notice or hearing. The reorganization Judge expressed his concern as to the absence of due process afforded Respondent by these procedures:

> "Unfortunatley, I say with a degree of sadness, the District Court was by-passed.
>
> "It is, in my opinion, a terrible thing when the reputation of a reputable lawyer is damaged by accusation unsupported by fact, and it is a terrible thing in any Court if an unsupported accusation is given credence. It is not my concept of justice." [Record 35].

The special panel's criticism of the Council's procedures was justified. However, the resolution was otherwise left intact by the Court's opinion. The Special Panel merely ordered that respondent be afforded elemental

due process, namely notice and a hearing in the District Court. [A. 17] Judge Aldrich emphasized the limited aspect of the Court's decision:

> "The petition for rehearing filed on behalf of the Circuit Council appears to misunderstand fundamentally the narrow scope of our decision. In the first place, it neglects that, as we pointed out, and as Judge Lumbard in his dissent recognized, the Council's rule, regardless of its form, was designed for Nolan. Nor did we say that we wished to substitute our view of the proper decision for that of the Council. Quite the contrary, our disagreement was basically with procedure; adding, to show that the issue was not moot, that there was another legally possible solution." [A. 34]

In reaching its conclusion, the Court of Appeals necessarily decided that it had jurisdiction to review the order of the District Court terminating Respondent. Very few orders of that Court are not subject to its review. The fact that the order in this case was based upon a directive of a judicial council provides no special distinction exempting it from the customary reviewing process. Suggestions that there should have been a petition by Nolan for a rehearing (an interesting word in this context, since Nolan had *no* hearing) confirms the conclusion of the Court of Appeals that the rule was designed for him alone. Further, it ignores the obvious futility of such an application. The proposed alternative that review be limited to the United States Supreme Court would deny reasonable relief to most litigants preclude any reasonable check on Council power, and impose unnecessary burdens upon this Court.

In the final analysis, the opinion below merely decided that a private litigant has been denied and is entitled to due process of law. Petitioner would improperly remedy the absence of a hearing or record by describing on review its behind the scenes activities. See *Zuber* v. *Allen*, 396 U.S. 168, 196 (1969).

(2) The petition is premature. The directive of the Court of Appeals was that a hearing should be afforded Respondent as to re-instatement in the District Court, the court au courant" the reorganization proceedings (A. 35). That hearing has yet to be held. Any determination of the District Court will be subject to appeal. The District Court might determine Respondent should not be reinstated. At that time however, a clear formal record will be available for a reviewing court's action, with the additional view of a new judge. This procedure is consistent with the position previously taken by the Judicial Council that the Court of Appeals would have jurisdiction to review the proceedings in the District Court. (A. 2).

(3) The Judicial Council is not before this Court, its petition having been filed by unauthorized representatives.

28 U.S.C.A. §516 provides:

> "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

28 U.S.C.A. §515 provides:

> "(a) The Attorney General or any other officer of the Department of Justice, or any attorney spe-

cially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

"(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000."

28 U.S.C.A. §518 provides:

"(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

"(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

28 U.S.C.A. §519 provides:

> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

28 U.S.C.A. §543 provides:

> "(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.
>
> "(b) Each attorney appointed under this section is subject to removal by the Attorney General."

Under these statutes, the Judicial Council may only be represented in these proceedings by the Office of the Attorney General or his designate. This has been recognized as to past proceedings in this matter as of July 18, 1973 since attorneys of the Department of Justice had appeared for the Council until that date.

Some agencies of the United States have been given specific statutory authority to proceed without the participation of the Attorney General, by falling within the words in 28 U.S.C.A. §519, "Except as otherwise authorized by law." Such is the case with the Administrator under the Emergency Price Control Act, the Interstate Commerce Commission, and the National Labor Relations Board, as has been noted in *F.T.C.* v. *Guignon*, 390 F. 2d 323 (8th. Cir.). The opinion in that case emphasizes the necessity for the Attorney General's representation

of any agency of the United States which is a party to the litigation and discusses the quoted words. There is no statutory exception available to the Judicial Council permitting it to proceed through private counsel. In *U. S. v. 1960 Acres of Land, etc.*, 54 F. Supp. 867 (S.D. Cal. C.D. 1944) it was held that the court had no jurisdiction over litigation involving an agency of the United States unless the Attorney General appeared. See also *United States* v. *Winston*, 170 U.S. 522 (1897); *Walling* v. *Crane*, 64 F. Supp. 88, 90 (N.D. Ga. 1945); *Booth* v. *Fletcher*, 101 F. 2d 676 (Dist. Col. 1939); *Richter* v. *U. S.*, 190 F. Supp. 159, 163-64 (E. D. Pa. 1960), affd. 296 F. 2d 509 (3 Cir. 1961), cert. den. 369 U.S. 828 (1962); *Smith* v. *United States*, 375 F. 2d 243 (5 Cir. 1967).

Rule 33 of this Court follows the statutory mandate. It provides:

> "(a) If the United States or an officer or agency thereof is a party, service of all brief, pleadings, notices and paper shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Where an agency of the United States authorized by law to appear in its own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case."

Here, the Solicitor General withdrew from the case on July 18, 1973. So far as any record shows, counsel on the Petition for a writ of certiorari are not in the office of the Attorney General and have no special or statutory designation reposing authority in them. Under the statutes and the cases, Council may not appear through them, and the court in which unauthorized appearances are made has no jurisdiction to proceed.

CONCLUSION

For the reasons stated, Respondent says that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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October Term, 1973.

No. 73-204.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

Respondent, in his brief in opposition (pp. 4-7), contends that petitioner, the Judicial Council of the Third Circuit, cannot be represented before this Court by its present counsel. The argument is that, pursuant to 28 U. S. C. § 516, the Judicial Council must be represented by attorneys from the Department of Justice and, failing such representation, the Judicial Council may not proceed further in this litigation.

There is no substance to this argument as a matter of law. However, before discussing the legal point, it is important to note the unusual circumstances here of which respondent seeks to take advantage. In connection with the litigation in the court below, the Judicial Council requested representation by the Department of Justice attorneys and that request was granted by the Attorney General. This

was, in other words, in no sense a case which came to be handled by the Department of Justice attorneys in the ordinary course of business. As made plain by Solicitor General Bork's letter to this Court of September 7, 1973, the decision not to proceed with that representation in connection with the appearance before this Court was based on the possibility of a conflict with the position taken by the Solicitor General's office in *Dooling v. Hilbert*, No. 71-1655. Once the possibility of inconsistent positions was realized, the Solicitor General suggested to petitioner that it should retain private counsel and this was done.[1]

Respondent now argues that, as a result of the Solicitor General's decision, the Judicial Council can go no further in this litigation. There is an ancient principle of statutory construction which completely negates the reading which respondent seeks to give to 28 U. S. C. § 516 in order to reach this result. This Court long ago stated that the general terms of a statute "* * * should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. * * *" *United States v. Kirby*, 7 Wall. 482, 486 (1868). See, also, *Holy Trinity Church v. United States*, 143 U. S. 457, 459 (1892). Respondent's position can be tested, under this principle, against the facts of the *Chandler* case. According to respondent, both parties to that case, a Federal judge on one side and the Judicial Council on the other, had to be represented before this Court by the Solicitor General. This would, of course, have created an absurd situation. Here, respondent's position

1. The possibility of conflict with respect to the scope of power of a Judicial Council between *Dooling* and this case underscores, we submit, the need for definitive review by this Court. And see the brief filed by the Solicitor General as *amicus curiae* in *Chandler v. Judicial Council*, 398 U. S. 74 (1970), in which the Solicitor General took the same position as to the scope of power of a Judicial Council as that urged by petitioner in this case (Brief for the United States as *amicus curiae*, Oct. T. 1969, No. 2 Misc., pp. 41-50).

leads to a no less than an absurd result, namely, that the litigation must cease because the Solicitor General finds himself in a situation involving a possible conflict of interest.

The discretionary power of the Attorney General to afford representation to Federal judges derives primarily from R. S. § 359, presently embodied in 28 U. S. C. § 518(b). That statute provides:

> "(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

It is by virtue of this statute that the power of the Attorney General to afford such representation has been frequently sustained. See *Booth v. Fletcher*, 101 F. 2d 676 (C. A. D. C. 1938), *cert. denied*, 307 U. S. 628 (1939); *Meredith v. VanOosterhout*, 286 F. 2d 216 (C. A. 8, 1960), *cert. denied*, 365 U. S. 835 (1961); *Weiss v. Bonsal*, 344 F. 2d 428 (C. A. 2, 1965). The power to afford representation under 28 U. S. C. § 518 is purely discretionary. There will be, as this Court knows, many situations, including mandamus proceedings, in which the interests of the United States are adverse to those of the Federal judge involved. In such cases, the Federal judge must either obtain representation or be represented by a party to the litigation. See, *e.g.*, *Ex Parte Fahey*, 332 U. S. 258 (1947); *United States v. United States District Court*, 334 U. S. 258 (1948).

The statute upon which respondent relies, 28 U. S. C. § 516, is the codification of a long line of statutes designed to control both the criminal and civil litigation arising out

of the activities of the Executive Branch of Government. The enactment of this statute in 1966 was a restatement of long existing law and no substantive changes in prior law were intended. See, *Hogg v. United States*, 428 F. 2d 274, 278 (C. A. 6, 1970). As the activities of the federal government increased in importance in national life, the need for centralized control became critical to avoid errors and inconsistency in litigation at both trial and appellate levels. The earlier statutes which placed ultimate authority of litigation to which the United States was a party[2] in the Attorney General were strongly reaffirmed by Section 5 of Executive Order 6166 of June 10, 1933. 5 U. S. C. (1958) pp. 139, 141.[3]

In short, then, the whole history of the law embodied in 28 U. S. C. § 516 is that it affirms the authority of the Attorney General over the litigation of the Executive Branch and over the activities of the several United States Attorneys. The statute has no necessary relationship to the unusual occasions on which the Attorney General may be called upon to furnish representation to the Judiciary or to the Congress.[4]

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2. See, *e.g.*, 1 Stat. 73; 16 Stat. 162; 62 Stat. 869, 910; 68 Stat. 1229; R. S. (1878 Ed.) § 346,361; 5 U. S. C. (1940 Ed.) §§ 306, 318, 333; 28 U. S. C. (1946) § 507(b).

3. The text of Section 5 of Executive Order 6166 is set forth in this Court's opinion in *Sullivan v. United States*, 348 U. S. 170, 172, ftn. 2 (1954).

4. Respondent proceeds on the literal basis the Judicial Council is an "agency" and is, therefore, covered by the statute. The meaning to be given "agency" depends on the statutory context in which the word is used and the Congressional purpose embodied in that statute, *United States v. Bramblett*, 348 U. S. 503 (1955), not by attempting to find a fixed meaning in the word. Thus, for example, 28 U. S. C. § 451 defines "court" and "judge" separately from "agency." In other words, the critical factor in interpreting 28 U. S. C. § 516 is its historical purpose, namely, control of litigation arising from the activities of the Executive Branch.

CONCLUSION.

For the reasons set forth in the petition filed on behalf of the Judicial Council, a writ of certiorari should issue.

Respectfully submitted,

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Attorneys for Petitioner.

Dated: September 13, 1973

FILE COPY

OCT 3 1973

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-204

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
Petitioner,

v.

JOSEPH M. NOLAN,
Respondent.

REPLY TO PETITIONER JUDICIAL COUNCIL'S REPLY BRIEF

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IN THE

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REPLY TO PETITIONER JUDICIAL COUNCIL'S REPLY BRIEF

Petitioner Judicial Council in its reply brief alleges that the pending matter was, "in no sense a case which came to be handled by the Department of Justice attorneys in the ordinary course of business" (P. 2). It is respectfully submitted that the request by the Judicial Council for representation by the Department of Justice *was* in the ordinary course of business and was made in compliance with Title 28 U.S.C.A., Section 516. It is also submitted that when the Solicitor General's office notified the Court of its intention to withdraw, the proper

procedure would have been for the Judicial Council to request the Attorney General to appoint a special attorney to represent it as permitted by 28 U.S.C.A. 515(a).

The main thrust of the Council's argument is that 28 U.S.C.A., Section 516 is applicable only to litigation of the Executive branch and the activities of the several United States attorneys. The Council concludes with the comment that the statute has no necessary relationship to the unusual cases on which the Attorney General may be called upon to furnish representation to the Judiciary or to the Congress. This conclusion is not supported by the existing case law. In *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C. A. 8th, 1960), *cert. denied* 365 U. S. 835 (1961), the Court considered an action filed against a United States Circuit Court judge. The Court commented that the Attorney General of the United States had been duly authorized to represent the Circuit Court judge, and in direct answer to objections filed by the plaintiff in that case against the representation of the Circuit Court judge by the United States Attorney, made the following statement:

> "In the instant case the United States was, of course, interested and concerned in a civil action brought against a judge of one of its courts for acts performed in his official capacity. The Attorney General exercising the discretion vested in him by the foregoing, authorized and directed the United States Attorney for the Southern District of Iowa to appear for and represent the appellee herein." (*Id.* at pp. 219-20)

See also *Booth* v. *Fletcher*, 101 F. 2d 676 (C.A. D. C. 1939), *cert. denied* 307 U. S. 628. The Court in the *Booth* case stated:

> "It is not even a doubtful question whether the appearance of these officers was proper in the present case." (*Id.* at 679).

See also *Weiss* v. *Bonsal*, 344 F. 2d 428 (C.A. 2, 1965), affg. *Weiss* v. *Morgenthau*, 233 F. Supp. 307 (S.D. N.Y. 1964), where the District Court stated:

> "It is unquestioned that the United States is 'interested' in a suit against a Judge of the United States District Court charging malfeasance in the execution of his duties." (*Id.* at 308).

The present matter relates to a review of an official act of a judicial council. It makes no material difference whether these acts are regarded as judicial in nature or administrative. The important question is that it was an official act, and the United States is interested and concerned when the acts are performed by its officers or agents in an official capacity. The cases cited under this statute do not distinguish between branches of government, but turn on the critical question of whether the act was performed by an officer of the United States in his official capacity. To sustain petitioner's argument that the statute does not apply to it, the argument would have to be carried to its logical conclusion, i.e. that no public rights are involved and that the acts of the Judicial Council are private, not public or official. The analogy drawn to the *Chandler* case by the Council is inappropriate. Respondent did not argue that the Attorney General should have represented both Judge Chandler and the Judicial Council. Judge Chandler instituted his action to protect his status as a public official, and he attempted to review the official acts of a judicial council who was represented by the Solicitor General's

office. It is obvious that there would have been no basis for the Attorney General to represent Judge Chandler.

The petitioner then attempts to create another straw man. It points to situations where the United States might institute mandamus proceedings against a federal judge. In that situation, the Attorney General should, pursuant to the statute, designate an independent attorney to represent the judge where his office continues to represent the government.

There is no reason in the instant case why the Judicial Council could not have requested the Attorney General to designate an independent attorney pursuant to 28 U.S. C.A., Section 515(a), and it is surprising that they have failed to do so.

Petitioner wishes to call to the Court's attention the decision of Judge Learned Hand in *Sutherland* v. *International Ins. Co. of New York*, 43 F. 2d 969 (C.A. 2, 1930), which analyzed the history of the predecessor statutes. Judge Hand indicated Congress did not intend the duplication of legal personnel, considered the cost, and centered the responsibility for the conduct of public litigation in the Attorney General (*Id.*, at 970). Judge Hand stated that "no such system is capable of operation unless his powers are exclusive . . ." (*Ibid.*)

Petitioner contends that statutes should not be construed to lead to injustice, oppression or absurd consequences. There can be no serious quarrel with this rule of statutory construction. On the other hand, the cases cited by petitioner state an even broader principle that is applicable here: that is, when the intent is plain nothing is left to construction or, stated alternatively, courts should not attribute meanings inconsistent with the clear statutory language. See *Holy Trinity Church* v. *United*

States, 143 U. S. 457, 459 (1892) and *United States* v. *Kirby,* 7 Wall 482, 486 (1968). It is respectfully submitted that there are no ambiguities in the statutes; they simply provide that when a public question is involved or an official act is being reviewed, the official should be represented by the Attorney General or his appointee. In the memorandum previously submitted by respondent in opposition to the petition for certiorari, he stated the cases showing that the failure to have the Attorney General or his appointee represent the involved governmental agency results in a failure of jurisdiction.

Respondent wishes to take this opportunity to point out a significant error in the Petition for a Writ of Certiorari under the heading "REASONS FOR GRANTING THE WRIT" at page 13. Petitioner stated: "The basic underlying facts with respect to Nolan's continued participation in the reorganization after his law firm had submitted a plan on behalf of a principal client of the firm were undisputed." This statement is totally incorrect as was clearly demonstrated in the Appellate Court opinion. The Court stated as follows:

> "Thereafter New York counsel appeared for Schiavone and Nolan continued to represent the trustee in a substantial amount of day to day legal work unconnected with reorganization plans." (A5)

Respondent does not wish to burden this reply memorandum with a wealth of factual detail which demonstrated that neither he nor his firm had any participation in the reorganization plans and definitely did not represent Schiavone in connection with their reorganization plan as the record adequately establishes this fact; and it is difficult to conceive how petitioner could have permitted this misstatement to be made in its petition.

CONCLUSION

For the reasons stated herein and in the brief previously filed by respondent, the Writ of Certiorari should be denied.

Respectfully submitted,

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